Service Date: August 22, 2003

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF Energy West	)	UTILITY DIVISION
Environmental Surcharge as authorized in Order	)	DOCKET NO. D2003.4.50
No. 5813a, Docket No. 94.11.52	)	INTERIM ORDER NO. 6503

* * * *

INTERIM ORDER

BACKGROUND

On June 1, 1995 Final Order No. 5813a in Docket 94.11.52 was issued. In that Order, an environmental surcharge in the amount of $182,736 was authorized for the investigation, assessment and remediation of the manufactured gas plant site on which Great Falls Gas's (now Energy West Montana) service center is located. The initial balance of the surcharge was to be calculated based on a two year recovery of the average annual basis. This resulted in a charge of $0.00401 per CCF of gas sold. The Commission's decision in the final order (a stipulated agreement between MCC and GFG) stated:

> "Approval of the initial surcharge is limited to the initial amount only. Great Falls Gas is expected to complete remediation at the lowest possible cost. Any cost increases beyond the initial amount must be requested by the Company and this Order does not approve those further cost increases. All changes in the surcharge associated with the manufactured gas plant must be approved by the Commission."

On April 15, 2003, the Commission found sufficient cause to direct a Complaint and Order to Show Cause Regarding Environmental Surcharge be issued. On May 29, 2003, the complaint was served.

Energy West Montana (the Company) responded to the Complaint and Order to Show Cause on July 18, 2003, after requesting an extension from the original June 30, 2003 deadline.

DISCUSSION

Manufactured coal gas was widely produced in the United States during the late nineteenth and early twentieth centuries. The Great Falls Gas Company (GFGC) produced manufactured gas from 1909 to 1928. Primary waste byproducts produced in the manufactured gas process consisted of ferrocyanide wastes and coal tar containing polynuclear aromatic hydrocarbon constituents and volatile organic compounds. Waste handling practices included selling of tar for useful products such as creosote or road tars. However, in some cases wastes were disposed of at the plant site.

The GFGC former Manufactured Gas Plant (MGP) site is located at 904 Ninth Street North, in an industrial commercial area of Great Falls. The property is about 5 acres in size. The Missouri River is about 500 feet north of the site. Since 1928, the site has been used by GFGC, now Energy West as a service facility. The remediation costs of the site were an issue in Docket No. 94.11.52. The stipulated agreement addressed the environmental surcharge issue through the establishment of an initial balance of $182,736 and that the surcharge would be calculated based on a two year recovery of the annual balance.

Energy West in its response to the Complaint and Order to Show Cause, believes that the Complaint arises out of two different interpretations of the same Order. The Company states that it was not its intention to demonstrate that the Commission interpretation was wrong or untenable, but intended rather that the Company's interpretation of the Order was reasonable.

The Company concludes that it must apply to the Commission for any changes (Company emphasis) in the surcharge, and that no change in the surcharge has ever been applied for (or made) by the Company. The Company admits that it should have sought clarification of its interpretation. The Company further states that its confusion about the interpretation stems from its understanding of what it had agreed to with the Montana Consumer Counsel (MCC) and the Commission's acceptance of that stipulation.

The Company made the following points in its response to the Complaint:

1. The Company apologizes to the Commission and its staff for failure to effectively communicate its understanding of Order No 5813a, which for eight years has differed significantly from the interpretation the Commission and its staff had placed on certain paragraphs of its order.

2. It was appropriate for the Commission to permit recovery of the costs at issue in the surcharge. The Company feels that the costs would have been recoverable by the Company through one mechanism or another and therefore, no ratepayer impact resulted from the Company's failure to abide by the Commission's interpretation of its order.

3. The different interpretations between the Company and the Commission regarding the Order should not subject the Company to penalty because the only harm that has resulted from the Company's failure to comply with the Order, as interpreted by the Commission, is that the Commission and its staff have not been given the same level of scrutiny to the costs incurred by the Company as they might have had if the Company had been required to renew its request for the surcharge.

Point No. 1 - The Company interpretation of the Commission Order is that the Company was permitted to recover the costs of the assessment, investigation and remediation of the Site through a surcharge mechanism that was to be calculated based on a two year amortization of the costs incurred as of the date of the stipulation. If any increase in the surcharge was required by the Company for those purposes, the Company would have to apply to the Commission for the increase in that surcharge.

The Company believes that its interpretation is reasonable in light of the stipulation accepted by the Commission, the "Order" paragraphs of the Commission's Order and the conduct of the Commission for several years after the expiration of the initial two year period.

The Company believes that there was no misunderstanding by the parties to the stipulation that the surcharge could be utilized for as long as it was prudently incurring costs associated with investigation, assessment and remediation of the Site without further Commission approval (other than ongoing approval of the tariff sheets containing the surcharge).

Point No. 2 - The Company believes that the costs were incurred in order to comply with environmental laws governing the contamination that occurred on the Company's former manufactured gas plant site between the years of 1908 and 1928. The Company contends that the costs would have been recoverable by the Company in through one mechanism or another and there would have been no ratepayer impact as a result of the Company's failure to abide by the Commission's interpretation of its order.

Point No. 3 - The Company believes it has produced evidence of the prudency of the cost incurred to investigate and remediate its cleanup site. The Company has successfully remediated the soil contamination on the site and received a closure letter from the DEQ respecting that effort. The Company is presently pursuing an acceptable resolution of the ground water

contamination on the site. The Company believes that because recovery of the remediation costs was not challenged on the basis that they were imprudently incurred or that they were otherwise not appropriate for recovery, that the costs were properly and prudently incurred.

The Company contends that it has a right to rely on the Commission's signature on the Company's tariff sheets as authorization to charge the rates appearing thereon, that no less than twenty-nine separate tariffs had been submitted to the Commission since that time and that all have included the surcharge rate.

The Company contends that the equitable principle of laches (or estopple) provides the Company protection in this situation, that principles will lie against a party when that party's delay in taking action has caused considerable inequity to another party, particularly when the time delays caused by such inaction make it difficult or impossible for the other party to protect itself from action that, but for the delay, would have been available to it.

In this instance, had the Commission notified the Company of its non-compliance, the Company would have had the opportunity to approach the Commission for recovery of the costs in a separate filing or in one of the two general rate cases it has processed since the Order No. 5813a was issued. With respect to the two general rate cases processed by the Company through the Commission, it was the Company's understanding that in a general rate case, all of the Company's rates and procedures are subject to review by the Commission and intervenors – including the environmental surcharge.

The Company's reasoning and justification for the continuation of the environmental surcharge is that the non-compliance was based upon a different interpretation by the Company and not a willful attempt to ignore the Commission order and it has accepted responsibility for not seeking clarification of the order to assure it was in compliance.

The Company's primary justification and alternate interpretation for the continuation of the surcharge is contained in the stipulated agreement in Order 5813a that states:

> That a surcharge be allowed in its rates to reflect the charges associated with the investigation, assessment and remediation of the manufactured gas plant site on which its service center is now located. That surcharge will be accounted for similar to GFGC's currently existing NIP loan account; all revenue received from the surcharge will reduce the balance in the account. All third party charges incurred in the investigation will be accounted for as a charge into the account; all revenue received from the surcharge will reduce the balance in the account. The initial balance for calculation of the surcharge will be $182,736. The unamortized balance will earn GFGC's last Commission approved return on rate base to allow GFGC to recover its time value of money. The surcharge will be calculated based on a two year recovery of the average annual balance.

The underlined emphasis was highlighted in the Company's response to the Complaint and Order to Show Cause to explain why the Company arrived at a different interpretation. What the Company failed to highlight were the lines in the Stipulated Agreement that stated "The initial balance for the calculation of the surcharge will be $182,736" and "The surcharge will be calculated based on a two year recovery of the average annual balance." The prefiled testimony of Sheila Rice in Docket No. 94.11.52 stated:

> "At appropriate intervals, but at least annually, the company will submit a balancing of the surcharge account to the Commission for recalculation of the surcharge amount."

The Company's own prefiled testimony indicates an understanding of the need for submitting the surcharge to the Commission for recalculation. The Commission could understand that the surcharge amount was miniscule when compared to the overall tariff structure and possibly overlooked in error by the Company. In the light of Ms. Rice's prefiled testimony, the Company's argument of an alternative interpretation appears to be rather weak.

The Company also stated that the stipulation contained the following two sentences:

> Furthermore, this settlement is offered as a complete unified settlement which has been arrived at through a process of compromise and negotiation. No part of this stipulation is hereby offered to the Commission as settlement of that issue without acceptance of the complete settlement as expressed herein.

The Company was trying to state that no part of the stipulation can be separated out without acceptance of the entire stipulation, and that the Commission was trying to separate out the environmental surcharge. What the Company failed to mention in its response, however, was that it may have *unilaterally* modified the stipulated agreement by continuing without Commission approval to collect the surcharge beyond its initial two year recovery period.

The second point argued by the Company was that the costs were incurred in order to comply with environmental laws and would have been recoverable by the Company through one mechanism or another and therefore there was no ratepayer impact. Without the opportunity to examine the costs through an open and vigorous review process, there are no assurances to support the contention.

Perhaps the strongest argument that Energy West has made in its response is the equitable principle of laches protection, that principles will lie against a party when that party's delay in taking action has caused considerable inequity to another party, particularly when the time delays caused by such inaction make it difficult or impossible for the other party to protect itself from action that, but for the delay, would have been available to it. The Company contends that the Commission had the opportunity to call into question the environmental surcharge during any of the rate cases after the establishment of the surcharge. However, the Commission notes that the converse of this argument could be made as well, however. Energy West had ample opportunity to initiate action to continue the surcharge and did not take any opportunity to do so. This may have caused considerable inequity to another party (the ratepayers) and makes it difficult or impossible for the other party to protect itself from action (paying the surcharge), but for the delay, would have been available to it.

FINDINGS OF FACT

Energy West failed to request continuance of the environmental surcharge established through Order 5813a whether through ignoring, oversight, negligence, or as it contended "alternatively interpreting the order."

Energy West must immediately cease collection of the environmental surcharge, and it must resubmit a request for any future collection of the environmental surcharge, with a date certain as to when the surcharge will end. The request must also include the total cost estimation of any remaining remediation. If the date certain is more than two years in the future, Energy West must submit another request for any extension at that time.

If a request is not submitted, Energy West must cease collection of the environmental surcharge and refund any revenues collected from the date the collection was to have ceased.

A full and complete review of the environmental cleanup revenues and expenditures associated with the environmental surcharge has not been done. The Commission reserves the

right to make a full and complete review of the remediation of the MFG plant and the environmental surcharge. The Commission reserves the right to make the determination whether any refund of the overcollection of revenues in excess of the original $182,736 is warranted.

CONCLUSIONS OF LAW

Energy West Montana provides natural gas service within the State of Montana and as such is a "public utility" within the meaning of § 69-3-101, MCA.

The Montana Public Service Commission properly exercises jurisdiction over the Energy West Montana's rates and operations pursuant to Title 69, Chapter 3, MCA.

ORDER

THEREFORE THE MONTANA PUBLIC SERVICE COMMISSION ORDERS THAT:

Energy West shall adhere to and abide by all Findings of Fact in this Order. All rate schedules shall comply with all determinations set forth in this Order.

Energy West shall file tariffs reflecting the termination of the Environmental Surcharge effective for service on and after August 20, 2003 in compliance with the Findings of Fact in this Order.

Energy West, if planning to request continuation of the Environmental Surcharge must file an application to reinstate the surcharge within 30 days of the service date of this Order.

This Interim Order is effective for service on and after August 20, 2003.

DONE IN OPEN SESSION at Helena, Montana on this 19th day of August 2003, by a 5 to 0 vote.

BY ORDER OF THE MONTANA PUBLIC SERVICE COMMISSION

_____
BOB ROWE, Chairman

_____
THOMAS J. SCHNEIDER, Vice Chairman

_____
MATT BRAINARD, Commissioner

_____
GREG JERGESON, Commissioner

_____
JAY STOVALL, Commissioner

ATTEST:

Commission Secretary

(SEAL)

NOTE: Any interested party may request the Commission to reconsider this decision. A motion to reconsider must be filed within ten (10) days. See 38.2.4806, ARM.